IN THE

Supreme Court of the United States

No. 70-5038

JOHN ADAMS,

Petitioner,

v.

THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Supreme Court of Illinois affirming the conviction of petitioner for the sale of narcotics is reported at 46 Ill. 2d 200, 263 N.E.2d 490.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on September 30, 1970. The petition for certiorari was filed on October 21, 1970, and granted on March 8,

1971. The jurisdiction of this Court is based upon 28 U.S.C. 1257(3).

QUESTION PRESENTED

The Court limited its grant of certiorari to the following single question:

1. Whether *Coleman v. Alabama*, 399 U.S. 1 (1970), is retroactive and/or applicable to a cause where, prior to trial, the defendant objected to the failure to provide counsel at the preliminary hearing?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

United States Constitution, Amendment XIV, Section 1:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioner was arrested on January 4, 1967, for the sale of narcotics and appeared before the Honorable Kenneth Wendt, a judge of the Circuit Court of Cook County, on February 10, 1967. Although petitioner had no lawyer, the court, without appointing counsel, proceeded to conduct a preliminary hearing. A witness (Police Officer Willis Nance) was sworn and testified against Petitioner; Petitioner was not given an opportunity to cross examine, nor to testify, nor to call witness in his behalf and Petitioner was thereupon held to the Cook County Grand Jury.

The said Grand Jury subsequently returned an indictment charging Petitioner with the sale of narcotics on January 4, 1967.

Prior to trial Petitioner moved the trial court, the Honorable Jacques F. Heilingoether, presiding Judge, to dismiss the indictment on the ground that his Constitutional guarantees under the United States Constitution, Amendments VI and XIV, had been denied by the failure to appoint counsel at the preliminary hearing, as aforesaid. In support of said motion, Petitioner set forth in full as an exhibit a transcript of the proceedings at the preliminary hearing. The trial court denied the motion to dismiss the indictment and the cause proceeded to trial.

The evidence for the People of the State of Illinois was exceptionally weak. It consisted almost entirely of the testimony of the alleged purchaser who was himself a narcotic addict, a previously convicted felon, a paid employee of the police department, and one who had perjured himself before the same Grand Jury (with respect to his true name) which indicted Petitioner. For several extended periods of time this alleged purchaser was out of the view of the arresting police officers, at places unknown to them. No marked money nor narcotics were found in the possession of the defendant-petitioner, who took the stand and denied the alleged $19.00 sale of narcotics.

However, the trial court chose to believe the informer and found the defendant-petitioner guilty and sentenced him to the penitentiary for a term of not less than ten (10) years nor more than thirteen (13) years.

SUMMARY OF ARGUMENT

Under any relevant test promulgated since *Linkletter v. Walker*, 381 U.S. 618 (1965), *Coleman v. Alabama*, 399 U.S. 1 (1970), should be accorded full applicability and retroactivity to the case at bar.

ARGUMENT

Linkletter v. Walker, 381 U.S. 618, was the first decision to deal with the problem of the retroactivity of another decision of the Court (*Mapp v. Ohio*, 367 U.S. 643).

According to *Stoval v. Denno*, 388 U.S. 293 (holding *United States v. Wade*, 388 U.S. 218, and *Gilbert v. California*, 388 U.S. 265, of prospective application only), *Linkletter* established a three-pronged criteria for resolution of the question of retroactivity:

> "(a) The purpose to be served by the new standards,
>
> "(b) The extent of reliance by law enforcement authorities on the old standards, and
>
> "(c) The effect on the administration of justice of a retroactive application of the new standards." (388 U.S. at 297.)

As we read *Williams v. United States*, and *Elkanich v. United States*, ___ U.S. ___, 9 Cr. L. 3015 (decided April 6, 1971, holding nonretroactive *Chimel v. California*, 395 U.S. 752), the relevant test of retroactivity is whether:

> ". . . the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts, in past trials . . . ." (___ U.S. ___, 9 Cr. L. 3017.)

If so, the "new" constitutional doctrine "has been given complete retroactive effect." 9 Cr. L. 3017.

Respectfully, we submit that applying any of the above tests to the case at bar, *Coleman v. Alabama*, 399 U.S. 1, should be held fully retroactive and applicable to the case *sub judice*.

A. "THE PURPOSE TO BE SERVED BY THE NEW STANDARDS"

We are reluctant to label an accused's right to counsel at the preliminary hearing a "new standard." As delineated below under B, petitioner takes the position that *Coleman v. Alabama*, 399 U.S. 1, decided nothing "new."

But if we are in error on this assessment, clearly the purpose of the *Coleman* rule requiring counsel at the preliminary hearing is to enhance the integrity of the fact finding process. We can not improve upon the words of Mr. Justice Brennan in *Coleman* stating the Court's reasons for holding that the Constitution requires counsel at the preliminary hearing:

> "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case, that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." (90 S. Ct. 2003.)

In the instant case, where the evidence of Petitioner's guilt was very weak (see Statement) retroactive application is justified because the *Coleman v. Alabama* Rule affects "the very integrity of the fact-finding process" and averts

"the clear danger of convicting the innocent." (*Johnson v. New Jersey*, 384 U.S. 719, 727-728.)

Petitioner also submits that a second, but by no means subordinate purpose of the *Coleman* Rule is that:

> "the right to counsel . . . [is] . . . so fundamental to our system of justice and so closely associated with guilt determination that society, and therefore the judicial system cannot accept a criminal judgment as final without the State being put to its full burden of proof by a trained adversary. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Any lesser standard places each individual as well as democracy in jeopardy. Without the finding of legal guilt beyond the most current standard of reasonable doubt, the validity of the conviction can never be completely without doubt, making subsequent or continued incarceration improper." *Retroactivity in Criminal Procedure Decisions*, 55 Iowa L. Rev. 1309 (1969-1970).

Petitioner thus submits that the purposes for the *Coleman v. Alabama* (399 U.S. 1) Rule mandate that the same be retroactive.

B. "THE EXTENT OF THE RELIANCE BY LAW ENFORCEMENT AUTHORITIES ON THE OLD STANDARDS"

Once again, we are reluctant to refer to pre-*Coleman v. Alabama* (399 U.S. 1) law as "the old standards." This is because Petitioner's counselless preliminary hearing took place on February 10, 1967. As of that date, law enforcement knew or should have well known, that the Constitution required counsel *at a trial, Gideon v. Wainwright*, 372 U.S. 335 (held retroactive in *Pickelsimer v. Wainwright*, 375 U.S. 2); *on appeal, Douglas v. California*, 372 U.S. 353 (held retroactive in *Daegele v. Kansas*, 375 U.S. 1); *at an arraignment where prejudice existed, Hamilton v. Alabama*, 368 U.S. 52; as well as *at arraignment where no prejudice was shown, White v. Maryland*, 373 U.S. 59 (held retroac-

tive in *Arsenault v. Massachusetts*, 393 U.S. 5 (1968)); *in recidivist proceedings, Greer v. Betto*, 384 U.S. 269 (1966); and even *in a police station, Miranda v. Arizona*, 384 U.S. 436 (1966) (held retroactive from the date of June 13, 1966, *Johnson v. New Jersey*, 384 U.S. 719, 721).

It is inconceivable that "law enforcement authorities" in February, 1967 should recognize an accused's right to appointed counsel in a police station (*Miranda v. Arizona*, 384 U.S. 436) but deny same in a court of law!

If the law enforcement authorities relied upon the "old standards" in February, 1967, it must have been the long discredited *Betts v. Brady*, 316 U.S. 455, standards.

Any supposed "reliance" by law enforcement authorities on some nebulous "old standard" at least since *Miranda v. Arizona*, 384 U.S. 436 (decided some eight (8) months prior to the denial of counsel in the case at bar). was voluntary on their part and completely unjustified.

C. "EFFECT ON THE ADMINISTRATION OF JUSTICE OF A RETROACTIVE APPLICATION OF THE NEW STANDARDS"

We come now to the real crux. In its opinion in the case at bar, the Illinois Supreme Court refused to hold *Coleman v. Alabama*, 399 U.S. 1, retroactive because such would have a "far reaching and grievous effect on the administration of justice" to the result that "thousands of cases without doubt would have to be reconsidered in light of the new requirement." (263 N.E.2d at 494.)

That is simply not the fact.

It is hornbook law, and no citation is necessary for the proposition that if an accused goes to trial and does not object to a certain procedure or bit of evidence, he may not object for the first time on appeal. There may be, and probably are "thousands" of convicted felons who did not have appointed counsel at their preliminary hearing. But if they had counsel at their trial, and counsel at the prelimi-

nary hearing (as did your petitioner), certainly there was a voluntary relinquishment of the right to counsel at that preliminary proceeding. Such is no different from a failure to object to a confession or illegally seized evidence. The failure to object at the trial where the accused has a lawyer is a full and complete waiver of the right to counsel at the preliminary hearing.

Our research had disclosed but six (6) Illinois cases, other than the case at bar, where the issue was raised in the trial courts: *People v. Bonner*, 37 Ill. 2d 553; *People v. Daniels*, 49 Ill. App. 2d 48, 199 N.E.2d 33; *People v. Smith*, 108 Ill. App. 2d 215, 247 N.E.2d 161; and *People v. O'Neal*, 118 Ill. App. 2d 116, 254 N.E.2d 559; *People v. Morris*, 30 Ill. 2d 406, 197 N.E.2d 433, and *People v. Masterson*, 45 Ill. 2d 499, 259 N.E.2d 794.

All other defendants, by proceeding to trial with a lawyer waived the point.

CONCLUSION

Under any relevant test, the decision in *Coleman v. Alabama*, 399 U.S. 1, should be held retroactive to the case at bar.

The *Coleman* decision makes evident the proposition that counsel at the preliminary hearing affects the very integrity of the fact-finding process.

Respectfully petitioner urges the reversal of his convictions.

Respectfully submitted,

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